

January 2010 Jury Tip: “Why your jurors’ hindsight is 20/20”

Psychologists have a habit of adding fancy labels to simple concepts. No doubt you already understand the psychological concept of “hindsight bias,” the topic of this month’s jury tip, as “Monday morning quarterbacking.” We’ve all heard the phrase “hindsight is 20/20,” and hindsight bias has a significant influence over jurors and their decision-making in trial.

In psychology terms, hindsight bias is the subconscious tendency for us to look back on an event with a known outcome and to overestimate how predictable or foreseeable that event was before it took place. Because every lawsuit involves a catastrophic event, your jurors spend a lot of their time deciding whether the litigants should have known it would happen and should have done a better job. Plainly said, hindsight bias means that jurors will unreasonably criticize your client for making “mistakes” that either caused the plaintiff harm or failed to protect themselves from it. And because jurors are also influenced by anxiety and the need to insulate themselves from feelings of vulnerability, the more sensitive and unreasonable they may be when the case involves traumatic and scary events. It can be scary for most jurors to admit “that could have been me,” so instead the jurors are tempted to convince themselves that “you should have known all along.”

If you were to ask residents of New Orleans in 2009 whether the government’s failure to test and reinforce the city’s levees before Hurricane Katrina was negligent, the “yes” votes would probably be unanimous. If you had asked the residents back in 2000 whether they believe the government should spend millions on the levees, I have no doubt the “yes” votes would be significantly lower. Knowing now what we didn’t know then has a powerful, biasing influence on how we judge decisions in the past.

In a 1995 study (by researchers Kamin and Raschlin, published in *19 Law and Human Behavior* 89, “Ex Post is not equal to Ex Ante: Determining Liability in Hindsight”), 57% of mock jurors found a city negligent for not hiring a bridge operator when those jurors were told there was an accident, while only 24% of mock jurors who were given the same fact pattern but were NOT told about the accident found the city negligent.

The most basic and important lesson about jurors and hindsight bias is to recognize that it WILL happen, on your jury, in almost every case. Don’t fool yourself into believing that your jurors won’t fault your client just because you believe the evidence will show your client couldn’t have foreseen or avoided the harm. Hindsight bias is a subconscious process, and not a reasonable one. Any time your plaintiff was unable to prevent being harmed, your jurors will search for reasons to criticize and blame them for their harms being “their own fault,” even when the harm was completely unforeseeable or the risks unavoidable. I have seen mock jurors and actual jurors blame plaintiffs for failing to inspect the brakes on their rental car, for assuming that it was safe to walk into a marked

crosswalk with a “walk” signal, for relying on fraudulent and forged documents, for not spending millions of dollars to microfiche medical records to back up back-up copies stored in a warehouse (which were destroyed in a fire), and for failing to make their products immune from high-tech piracy and hacking.

The same goes for defendants; don’t fool yourself into believing that your jurors won’t unfairly fault your defendant just because the harm wasn’t foreseeable. Hindsight bias gives jurors an amazing ability to foresee anything, fair or not. Simply because a plaintiff was injured, some jurors will find that a defendant was reckless, even when the defendant took reasonable care. Any time your defendant’s conduct caused a bad result, your jurors will be tempted to believe your defendant should have known better and will search for reasons why the most inadvertent or unforeseeable disasters were caused by negligence. I have seen jurors use backwards logic to blame doctors for surgeries gone wrong; “that surgery was so simple and routine, so the surgeon MUST have made a negligent mistake if the patient ended up in worse health than before.” I have seen jurors blame manufacturers for making unsafe products, even when all the safety testing and FDA or EPA approval suggested the product was perfectly safe: “I’m sure the company knew all along that [the product] was unsafe.”

So the first lesson is simple: understand hindsight bias, expect that it can and will happen to your jurors, and assess the merits and risks of your case accordingly. Too often I’ve seen lawyers head into trial unaware and underestimating how much the jurors will unfairly criticize their client for making “mistakes.”

Once you realize and accept the fact that jurors are going to unfairly search for reasons to blame your client, even when you have good explanations, what can you do about it? The truth is, jury selection may be your only opportunity to protect your client from hindsight bias, because multiple research studies have suggested that it is unavoidable, even when the test subjects are educated about hindsight bias. Some studies suggest that “self-referencing”—actually telling the jurors “what would you do (or how would you feel) if this happened to you?”—may reduce hindsight bias a little, but most courts would probably find obvious self-referencing inappropriate and objectionable. Your best chance to protect against hindsight bias, when your client is more vulnerable to unfair blame than the opposing litigant, is to remove those jurors who are more susceptible to hindsight bias.

The first step is to identify the most damaging criticisms and “mistakes” your jurors will believe your client made, and address them in voir dire. Remove those jurors who immediately criticize your client and find their “mistakes” inexcusable. Believe it or not, I’ve encouraged plenty of jurors to admit “I could never forgive your client for doing that” in voir dire, and removed them for cause or with a peremptory. For the rest of your jurors with concerns about what your client “should have done,” use the “elephant in the room” I taught you in last November’s jury tip to flush out and address their criticisms.

In my experience, I have found that pro-active, self-reliant, hands-on jurors (at times I've also called them "do-it-yourselfers") are much more likely to be guilty of hindsight bias than passive jurors. Pro-active jurors tend to feel much more in control of their lives and their fate, so they often have unreasonable expectations of how much control others have on their lives and of others' abilities to avoid getting harmed and avoid harming others. Passive jurors are those who don't feel the need to be personally involved with all their affairs, who delegate their well-being to others (like trusting a doctor or financial planner with their health and finances completely), and who don't feel the need to take extra precautions. Passive jurors feel much less control over the lives, and so they are far less likely to unrealistically blame the litigants for failing to prevent harm.

After jury selection, your next best way to protect your client from hindsight bias is to find subtle ways to self-reference; that is, to force your jurors to empathize with your client and put themselves in their shoes.

Plaintiff's counsel, because they get the first chance to tell the story, have a unique opportunity to take hindsight away from the jurors. If you get the first crack at telling the story, make sure to put the jurors in your client's shoes by explaining what they knew and what they did BEFORE telling the jurors about the unforeseeable, catastrophic event that caused so much harm. By forcing the jurors to understand your plaintiff's point of view before they find out what happened, they will have a much less biased view of how foreseeable the harms were and how unreasonable it would have been to expect the plaintiff to have taken seemingly unnecessary precautions or to have done something different.

Defendants don't have the luxury of taking away hindsight and giving the jurors a clear view of what the defendant knew. You can certainly try explaining why the catastrophic events were so unexpected before they happened, but you can't avoid the natural tendency toward hindsight bias. Your better chance might be to tell your story in *voir dire*, before the plaintiff has the chance to give an opening statement. Ask self-referencing questions that force jurors to think about how they might respond to similar situations or what kind of precautions they take (or don't take) to avoid risks.

The goal of every lawyer's trial presentation should be to get your jurors to step into your client's shoes, ask themselves "what would I have done," and agree with their approach and the decisions your client made, regardless of the bad result. Make every effort to help your jurors empathize with your client, but realize that hindsight bias is a powerful, inevitable force that will make it difficult for your jurors to judge your client fairly.

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